IN THE SUPREME COURT OF OHIO

CASE NO. 2025-0386

JOHN PAGANINI,
Plaintiff-Appellee,

-vs-

THE CATARACT EYE CENTER OF CLEVELAND d/b/a CORRECTIVE EYE CENTER, CEI PHYSICIANS, P.S.C., LLC, and GREGORY J. LOUIS, M.D.,
Defendant-Appellants.

ON APPEAL FROM THE EIGHTH DISTRICT COURT OF APPEALS CUYAHOGA COUNTY, CASE Nos. CA-24-113867 and CA-24-114019

MEMORANDUM IN RESPONSE OF PLAINTIFF-APPELLEE, JOHN PAGANINI

Susan E. Petersen, Esq. (#0069741)
Todd E. Petersen, Esq. (#0066945)
PETERSEN & PETERSEN
Chardon, OH 44024
(440) 279-4480
sep@petersenlegal.com
tp@petersenlegal.com

Louis E. Grube, Esq. (#0091337)
[Counsel of Record]
FLOWERS & GRUBE
Terminal Tower, 40th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
leg@pwfco.com

Attorneys for Plaintiff-Appellee, John Paganini

Bradley D. McPeek, Esq. (#0071137)
Kellie A. Kulka, Esq. (#0095749)
BRICKER GRAYDON LLP
312 Walnut Street, Suite 1800
Cincinnati, OH 45202
(513) 621-6464
bmcpeek@brickergraydon.com
kkulka@brickergraydon.com

Attorneys for Defendant-Appellants, The Cataract Eye Center of Cleveland, Inc. and Gregory J. Louis, M.D.

Benjamin C. Sassé, Esq. (#0072856)
Elisabeth C. Arko, Esq. (#0095895)
Razi S. Lane, Esq. (#0105334)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
(216) 696-3715
benajmin.sasse@tuckerellis.com
elisabeth.arko@tuckerellis.com
razi.lane@tuckerellis.com

Attorneys for Amicus Curiae, Ohio Association of Civil Trial Attorneys

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

Anne Marie Sferra, Esq. (#0030855)
BRICKER GRAYDON LLP
100 S. Third Street
Columbus, Ohio 43215
(614) 227-2300
asferra@brickergraydon.com

Attorney for Amici Curiae, Ohio Hospital Association, Ohio State Medical Association, Ohio Osteopathic Association, Ohio Alliance for Civil Justice, and Academy of Medicine of Cleveland & Northern Ohio

Sean M. McGlone, Esq. (#0075698)
Senior Vice President and General Counsel, Ohio Hospital Association
155 E. Broad Street, Ste. 301
Columbus, Ohio 43215
(614) 384-9139
sean.mcglone@ohiohospitals.org

Attorney for Amicus Curiae, Ohio Hospital Association

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

TABLE OF CONTENTS

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST, AND IT DOES NOT RAISE ANY UNANSWERED CONSTITUTIONAL QUESTIONS

In perhaps one of the most overtly political writings recently submitted to this Court, Defendant-Appellants, the Cataract Eye Center of Cleveland, Inc. and Gregory J. Louis, M.D. ("Defendants"), admittedly seek error-correction at most. They do not ask this Court to overrule or limit its decisions in *Morris v. Savoy*, 61 Ohio St.3d 684 (1991), and *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, which are dispositive on the constitutional viability of laws limiting the recoverable amount of non-economic damages. Defendants make no mention of *Westfield Ins. Co. v. Galatis*, 2003-Ohio-5849, nor do they argue that its standard for overruling prior precedents might be satisfied.

No, this appeal only seeks a ruling that the lower courts "misapplied *Morris*." *Defendants' Memorandum in Support of Jurisdiction filed March 17, 2025 ("MISJ"), p. 12*. Everything about this appeal ultimately boils down to that request. And yet these Defendants waived any argument before the trial court that *Morris* did not apply or how it might apply in their favor. They failed to even address *Morris*. As a result, there is nothing about this case rising to the level of public or great general interest, and the lower courts were free to do their level best enforcing the existing constitutional rulings in *Morris* and *Arbino*. There is nothing new to consider, just old case law to apply.

Even if mistaken, this Court does not exist for the purpose of correcting lower-court decisions where binding authority already exists. *See State v. Barnes*, 2022-Ohio-4486, ¶ 44-48 (Fischer, J., dissenting); *State v. Jones*, 2020-Ohio-4031, ¶ 38 (Kennedy, J., dissenting). Its "role as the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address issues of public or great general interest." *State v. Noling*, 2013-Ohio-1764, ¶ 63 (O'Donnell, J. dissenting). In any

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

individual dispute, nitpicking a lower courts' fair effort to apply a constitutional ruling *already issued* from this Court serves no statewide purpose. Those precedents bind the rest of Ohio's courts no less merely because one court may have erred in one case. Only in limited instances, where "the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state," would Ohio's constitutional order require this Court to intercede. *Ohio Const., art. IV, § 3(B)(4); See Ohio Const., art. IV, § 2(B)(2)(f)*. And the Defendants make no claim of conflict, because none exists.

Make no mistake, *Morris* and *Arbino* were properly applied below. But even for Justices who disagree, that is not and should not be enough to assert this Court's jurisdiction and consider the merits. There are plenty of new and unsettled areas of the law to consider, and there is no need to retread old ones, where the bench and bar have ample preexisting guidance. This Court should wait and see whether a conflict ever arises in the application of *Morris* and *Arbino* to R.C. 2323.43(A)(3), the limit on recoverable non-economic damages for those who are catastrophically injured. The Defendants tacitly concede this possibility, as nobody can say how the anticipated ruling in *Lyon v. Riverside Hosp.*, Tenth Dist. Franklin No. 23AP-379, will turn out. *MISJ, p. 4.*

Until a conflict does arise, deciding a case like this one will do nothing to help the citizenry of Ohio generally or to clarify the still-settled law of the Ohio Constitution set forth in *Morris* and *Arbino*. Without a conflict, the present uniformity among lower courts applying *Morris* and *Arbino* shows that this Court's work was done following those decisions. This Court should honor its prior work by leaving it done instead of undoing it, as Defendants ask.

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

STATEMENT OF THE CASE AND FACTS

Plaintiff-Appellee John Paganini ("Paganini") filed suit against Defendants, ophthalmologist Gregory Louis, M.D. and his practice, claiming he failed to properly diagnose an eye infection called "endopthalmitis" following cataract surgery. *T.d. 1, Complaint filed November 29, 2022, ¶ 12-16*. This lapse led to a loss of vision and, ultimately, the death and inevitable removal of Paganini's left eye. *Id*. In the Opinion and Order on review, the trial court capably summarized the relevant procedural facts:

> Plaintiff John Paganini prevailed on a medical negligence claim tried to a jury. The jury found that the Defendants, Dr. Gregory Louis, M.D., and Cataract Eye Center of Cleveland, Inc. were liable for negligently failing to diagnose and treat a progressing eye infection in Paganini's left eye following cataract surgery. Because of the failure to timely diagnose this, Paganini lost vision in his left eye. Paganini only sought noneconomic damages for the loss of sight in his left eye. The jury's verdict in favor of Paganini was for $1,487,500 in past and future noneconomic damages. The jury also found that Paganini's injury constituted a loss of a "bodily organ system" and a "substantial physical deformity."

T.d. 152, Opinion and Order filed April 16, 2024 ("Trial Op."), p. 2.

After the verdict, Paganini asked the trial court not to apply R.C. 2323.43(A)(3), arguing that, as applied to him, it violates the due course of law provision in Ohio Const., art. I, § 16, consistent with this Court's decisions in *Morris* and *Arbino*. *T.d. 126, Plaintiff's Motion to Include in Any Judgment the Full Amount Awarded for Noneconomic Damages filed February 6, 2024, p. 4-10*. Paganini explained that as a permanently, catastrophically injured 92-year-old, he belongs to the class of "seniors," for whom "damages are disproportionately noneconomic due to lower claims for lost income." *Id., p. 1, 8*. He supplied seven rulings from various trial courts throughout Ohio that determined R.C. 2323.43(A)(3) cannot pass muster within a rational-basis review. *Id., p. 2-3*. Many of those decisions simply applied the clear ruling in *Morris*. *Id.* And he

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

provided a statutorily mandated government study that discovered only thirty lawsuits between 2005 and 2019 had resulted in a verdict including substantial non-economic damages that would trigger this law—only 0.32% of medical malpractice cases even resulted in a verdict for the plaintiff after a trial. *Id., p. 2, 7*. The Defendants predictably opposed Paganini's as-applied challenge. *T.d. 136*.

The trial court agreed with Paganini on April 16, 2024, giving a "lengthy history lesson" on the due course of law protections of the Ohio Constitution and showing that "*Morris* constitutes the law of the State of Ohio" and "controls the outcome of this case." *Trial Op., p. 13*. Importantly, the trial court noted that Defendants "do not cite to *Morris* and explain how it does not control the outcome of this case." *Id*. Consequently, "the legal tests" applicable to the case were "not in dispute." *Id., p. 2*. Defendants also did not "take a position on what kind of challenge this is," leaving the trial court free to confirm this was indeed "an as-applied challenge" based upon "a specific set of facts." *Id., p. 3*. Under this procedural posture:

> [T]his Court is required to do two things when looking at a noneconomic damages cap for medical claims. First, it must determine if the legislative findings demonstrate a real and substantial relationship between the caps and the general welfare of the public. In particular, whether there is actually evidence that the cap for catastrophic injuries will reduce malpractice insurance rates. Second it must determine whether the cap "imposes the cost of the intended benefit to the public solely upon those most severely injured."

Id., p. 15-16. Under that test, the trial court concluded that "Paganini has shown by clear and convincing evidence that R.C. 2323.43(A)(3) is 'unreasonable and arbitrary' and that applying it to him will violate his rights under the due course of law clause." *Id., p. 18*.

In reaching this ruling, the trial court accepted that "the goal of lowering medical malpractice insurance rates is related to the general welfare of the public" and "there is a

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

substantial relationship between medical malpractice rates and noneconomic damage caps as a general matter." *Trial Op., p. 16*. The court only rejected that there was "a real and substantial relationship between malpractice insurance rates and capping noneconomic damages for *catastrophic* injuries." (Emphasis added.) *Id*. While the General Assembly made a "platitudinal" statement of such a finding, the law did not "explain how capping noneconomic damages for such a small group of highly injured people will effect rates in addition to the cap for other medical claimants." *Id., p. 16-17*.

Relying on *Arbino*, the court explained that legislative recognition of "the more concrete evidence of noneconomic damage in catastrophic injury cases" when R.C. 2315.18 was enacted required some explanation "why it was still necessary to limit recovery for this severely injured group to lower malpractice rates." *Trial Op., p. 17*. Without such evidence, it was "unclear how applying the cap to Paganini, given his injury, bears a real and substantial relationship to advancing the government interest in lowering malpractice insurance rates." *Id*. The de minimis statewide impact of R.C. 2323.43(A)(3) was its own downfall: "There is no evidence from the legislature that cutting a plaintiff like Paganini's award, or the awards of the one or two similarly situated people a year, cuts rates in a meaningful way beyond other reform efforts." *Id*.

On that record, the trial court ruled that it simply needed to apply *Morris*.[1] *Trial Op., p. 17-18*. This Court "held that '[i]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice.'" *Id., p. 17*, quoting *Morris*, 61 Ohio St.3d at 691.

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

[1] Although Paganini also lodged an equal protection challenge to R.C. 2323.43(A)(3), this part of his motion was rejected. *Trial Op., p. 19-20*. Paganini did not appeal this aspect of the trial court's ruling, and it remains undisturbed.

And it was no less arbitrary and irrational, according to the trial court, to do so in the context of medical malpractice claims. *Id., p. 17-18*. Because the trial court was bound to follow *Morris* and *Arbino*, not even "due deference to the considered judgment and factual findings of the General Assembly" could save R.C. 2323.43(A)(3) as applied to the facts of this dispute. *Id., p. 18*.

Defendants appealed to the Eighth District Court of Appeals, assigning as error: "The trial court erred in entering judgment for Paganini and finding R.C. 2323.43(A) unconstitutional as applied to Paganini." *Paganini v. Cataract Eye Ctr. of Cleveland*, 2025-Ohio-275, ¶ 1 (8th Dist.). Although Defendants had waived any opportunity to assert what kind of challenge this was during the trial court proceedings, the court of appeals considered and rejected their new arguments that this was really a facial challenge all along. *Id.* at ¶ 50. Paganini's argument was "specific to his unusual circumstances, namely that the statute requires him to forego 66.4% of the damages awarded to him by the jury in order to lower medical-malpractice insurance rates for the public's benefit." *Id.* Being "mindful" of the presumption that statutes passed by the General Assembly are constitutional, and applying the "'the rational-basis test'" given by this Court for due course of law challenges, the court of appeals affirmed. *Id.* at ¶ 51-53, quoting *Arbino*, 2007-Ohio-6948, at ¶ 49. Considering and applying this Court's numerous precedents declaring which kinds of laws limiting recovery of non-economic damages are and are not valid, including *Morris* and *Arbino*, R.C. 2323.43(A)(3) violated the due course of law provision in Ohio Const., art. I, § 16. *Id.* at ¶ 54-67.

The court of appeals echoed the trial court's concerns; it was "not clear from the legislative findings" or the legislature's "ongoing study" on the impact of R.C. 2323.43(A)(3) "how the cap on noneconomic damages for catastrophic injuries will have

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

any impact in reducing malpractice insurance rates since there have been so few cases involving these types of injuries." *Paganini* at ¶ 63. Since the General Assembly had only discovered thirty cases to which the law could have applied to between 2005 and 2019, and because there was no indication in the legislature's study "how many of these cases involved catastrophic injuries," the court of appeals agreed that "the legislative findings fail to demonstrate a real and substantial relationship between the capping of noneconomic damages for catastrophic injuries and malpractice insurance rates." *Id*. at ¶ 64. So, just as the trial court had, the court of appeals applied *Morris* and affirmed the trial court's ruling. *Id*. at ¶ 65-67.

ARGUMENT

This Court should reject the Defendants' sole proposition of law:

> **THE "HARD LIMIT" ON RECOVERABLE NONECONOMIC LOSS IN R.C. 2323.43(A)(3) THAT APPLIES TO SERIOUS OR "CATASTROPHIC INJURIES" DOES NOT VIOLATE THE "DUE COURSE OF LAW" PROVISION IN ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND IS, THEREFORE, CONSTITUTIONAL.**

MISJ, p. 7. As explained above, this sensationalist and problematically political appeal serves no generally important purpose for Ohio. The Court effectively rejected the Defendants' legal proposition in *Morris* and confirmed that ruling in *Arbino*, the lower courts applied the text *and spirit* of those decisions, and there is nothing left to do.

Here, the only real concern for "judicial activism," *MISJ, p. 5*, is that the Defendants' bluster and their support from loyal and influential *amici* might convince the Court to accept this appeal and issue a ruling inconsistent with *Morris* without engaging in the stare decisis analysis mandated by *Westfield*. Only a court acting "as a super-legislature" would reject the findings of the "2019 Ohio Department of Insurance Report"

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

that the General Assembly itself mandated. *See MISJ, p. 5; compare Paganini*, 2025-Ohio-275, ¶ 63-64 (8th Dist.). Defendants ask this Court to ignore reality as the General Assembly's report found it because they apparently prefer "the data that the General Assembly actually considered in 2003." *MISJ, p. 5.* And yet that effort is itself the best rebuttal of the Defendants' own waived argument that Paganini is "really attacking the statute facially" rather than as applied to him. *Id., p. 6.*

This dispute takes place in the present, not the world as it stood in 2003, and this as-applied challenge was properly decided based upon lessons learned from the legislatively ordered study that ceased mysteriously in 2019. In that way, Paganini has not argued and does not assert "that the statute is unconstitutional under *all* circumstances." *MISJ, p. 5.* It is totally beyond the scope of this dispute whether the statute could be valid as to those injured by medical negligence before the 2019 report, and it is conceivable that suits seeking recovery for such injuries are still wending their way through the lower courts. Regardless, Defendants waived any argument about whether Paganini's constitutional challenge was facial or as-applied by failing to make one to the trial court. *Trial Op., p. 3.* They provided lots of authority about the differences between such challenges in the "Standard of Review" section of their memorandum, admitted that "the line between facial and as-applied challenges is often blurry," and then wholly failed to take a position on which kind this case presented. *T.d. 136, p. 11-13.*

Even if such arguments had not been waived in the trial court, they would still be wrong. There is no dispute that Paganini is a permanently and substantially deformed 92-year-old man, who lost a bodily organ system. *R.C. 2323.43(A)(3).* Per the statute, both questions were submitted to the jury and answered in the affirmative. Neither determination was challenged in the trial court or on appeal. And because he does not

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

seek to have the statute invalidated for anyone younger or less-seriously injured, the scope of his constitutional challenge is even narrower. It is far from the facial challenge the Defendants try to cast as a full-frontal assault on the General Assembly's prerogative. And even if there was a preserved issue regarding the kind of challenge presented, it is conspicuous that Defendants have not offered any proposition of law related to that issue.

Turning to the proposition of law that has been supplied, Paganini appears to be, at most, the thirty-first person to fall within R.C. 2323.43(A)(3) since 2005. There is no reason to believe that limiting the few individuals like Paganini to recovering five-hundred-thousand dollars of noneconomic loss will have any impact on the malpractice insurance market at all, much less that it will result in "higher medical malpractice premiums." *MISJ, p. 5*. And in fact, that was the lesson taught in *Morris* and confirmed by *Arbino*.

In *Morris*, this Court considered a 1975 law "setting a $200,000 cap on general damages that may be awarded for medical malpractice," employing the rational-relation test to determine whether it comported with due process guarantees. *Morris*, 61 Ohio St.3d at 686. Under that test, a "court's function is only to determine whether the method employed bears a 'real and substantial relationship' to public health or welfare or whether it is 'unreasonable or arbitrary.'" *Morris* at 689-690. But there was no evidence that the law was tethered to its purpose:

> We are unable to find, either in the *amici* briefs or elsewhere, any evidence to buttress the proposition that there is a rational connection between awards over $200,000 and malpractice insurance rates. There is evidence of the converse, however. The Supreme Court of Texas found no relationship between insurance rates and the cap, citing an independent study that showed that less than .6 percent of all claims brought were for more than $100,000. *Lucas v. United States* (Tex.1988), 757 S.W.2d 687, 691. According to three

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

> *amici* arguing against the statute's constitutionality, a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, found that the savings from various tort reforms, including a $250,000 cap on noneconomic damages, were "marginal to nonexistent." Neither respondent nor any of the *amici* who argued in favor of the statute has offered evidence that the damage cap has been a factor in medical malpractice insurance rate setting. Conceivably, such evidence may exist, but that would require a second trip to the General Assembly. (Footnote omitted.)

Id. at 690. The Court agreed with an observation by the Ninth District Court of Appeals: "'* * * [I]t is irrational and arbitrary to impose the cost of the intended benefit to the general public solely upon a class consisting of those most severely injured by medical malpractice. * * * ' *Nervo v. Pritchard* (June 10, 1985), Stark App. No. CA-6560, unreported, at 8." *Id.* at 691. So, this Court declared the law "unconstitutional because it does not bear a real and substantial relation to public health or welfare and further because it is unreasonable and arbitrary." *Id.* Using different words to be sure, the Court declared that a 'hard limit' on non-economic damages is indeed unconstitutional when it applies to those who have been seriously or catastrophically harmed. *Id.*

The trial court and appellate rulings below square directly with the reasoning in *Morris*. The main difference between *Morris* and the instant dispute is that we know the results of the "second trip to the General Assembly" that this Court ordered the medical malpractice defense bar to take. *Morris*, 61 Ohio St.3d at 690. A study was mandated by law, and its results completely undermine the law that was passed decades ago. If a law covering 0.6% of all medical malpractice claims had too small an impact upon the medical malpractice insurance market as explained in *Morris*, then the fact that only ".32 percent of medical-malpractice claims result in a plaintiff's verdict" in Ohio annihilates any justification for capping such verdicts. *See Paganini*, 2025-Ohio-275, ¶ 64 (8th Dist.).

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

That "there have only been 30 cases between 2005 and 2019 in which a jury returned a verdict for a plaintiff in a medical malpractice action that was in excess of the statutory caps on damages" seals the lid on R.C. 2323.43(A)(3)'s coffin firmly shut. *Id.* The clear result of the study is that the vast bulk of cases that ever could fall under R.C. 2323.43(A)(3) are settled by malpractice insurance carriers, placing these businesses firmly in control of the payouts that purportedly impact their rate-setting. *See Id*. The promise of the law was thus never achieved, largely because of the way those benefitting from the law choose to make settlement offers.

In those ways, the lower courts properly applied *Morris* upon its own terms by invalidating a law going irrationally and arbitrarily beyond its stated purpose. Indeed, with Ohio-specific data, Paganini presents an even more pronounced due process violation than the one at issue in *Morris*. It would be the height of arbitrariness and wildly unreasonable for a law to remain in place once a legislatively mandated study discovers that it serves no purpose, particularly where the law takes hundreds-of-thousands of dollars away from those a jury has determined are entitled to full justice for their injuries.

In *Arbino*, this Court employed the same rational-relation test it used in *Morris*, this time to assess a law that limited recoverable non-economic damages in "certain tort actions" *unless* the plaintiff had been permanently and catastrophically injured. *Arbino*, 2007-Ohio-6948, at ¶ 27-28, 48-62. With this new law, however, the General Assembly considered some "evidence demonstrating that uncertainty related to the existing civil litigation system and rising costs associated with it were harming the economy." *Id.* at ¶ 55. Moreover, the Court drew a distinction from the law at issue in *Morris*, which "imposed the cost of the intended benefit to the public solely upon those most severely injured." *Id.* at ¶ 59. The new law escaped that pitfall by dodging it completely, "allowing

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

for limitless noneconomic damages for those suffering catastrophic injuries":

> [T]he General Assembly must be able to make a policy decision to achieve a public good. Here, it found that the benefits of noneconomic-damages limits could be obtained without limiting the recovery of individuals whose pain and suffering is traumatic, extensive, and chronic, and by setting the limits for those not as severely injured at either $250,000 or $350,000. Even Arbino acknowledges that the vast majority of noncatastrophic tort cases do not reach that level of damages. Id. The General Assembly's decision is tailored to maximize benefits to the public while limiting damages to litigants. The logic is neither unreasonable nor arbitrary. (Emphasis added.)

Id. at ¶ 60-61. Structured in that way, limits on recovery of non-economic damages can comport with due process. And the lesson of *Arbino* and *Morris*, taken together, is that capping non-economic damages for the diminishingly small number of individuals who are permanently and catastrophically injured is irrational and arbitrary, even if doing so for those less injured bears a rational relationship to the legislative prerogative. That is why it makes no sense to invent different "policy concerns" that apply to "medical malpractice" but not "[a]uto accidents, slip-and-falls, and other general torts." *MISJ, p. 14.*[2] The kind of tortfeasor has never mattered in the constitutional calculus about the validity of laws limiting what non-economic damages the catastrophically injured may recover from tortfeasors. Put more simply, if physicians were entitled to special treatment for some reason, it would have been discussed in *Morris*.

As a result, the Defendants complaints that the "Eighth District abandoned judicial

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

[2] The Defendants' analogy to the limited recovery available from the Workers' Compensation Fund is as weak as it could possibly be. *MISJ, p. 14.* The limited recoveries available through in the Workers' Compensation system were accomplished through a constitutional amendment. *Ohio Const.,art. II, § 35.* There is nothing stopping the medical community from entering a similar bargain with the people of Ohio, but until such time, there is no comparing this case to a worker's injury claims.

restraint" ring hollow. *MISJ, p. 5*. The result below is better explained by reference to the role of the intermediate appellate courts, one that prevented the Eighth District from ignoring *Morris* and *Arbino* to give Defendants what they wanted. All the Eighth District could do was apply these decisions to the case at hand:

> Any other approach returns us to a world in which the lower courts may anticipatorily overrule all manner of Supreme Court decisions based on counting-to-five predictions, perceived trajectories in the caselaw, or, worst of all, new appointments to the Court.

See DeBoer v. Snyder, 772 F.3d 388, 401 (6th Cir. 2014).

If principles of judicial restraint play a role at all in the instant appeal, they firmly counsel this Court to wait for a dispute in which the appellant has clearly preserved and lodged a challenge to the binding precedents that dictate the outcome the lower courts had to reach. Defendants obviously failed to do that in this matter. They ignored *Morris* in the trial court instead of explaining why it did not apply or challenging it as wrongly decided. *Trial Op., p. 2, 13*. As explained above, the uniform application of *Morris* by lower courts to disputes like this one further demonstrates that there is no reason to revisit it. If an Ohio court ever does reach a contrary result when applying *Morris* to R.C. 2323.43(A)(3), resulting in a proper conflict, this Court can trust that it will hear about it in a new appeal. Those representing the Defendants' fervent *amici* can be trusted to make another full-court press, just as they did here even despite the inapt procedural posture and weak vehicle for the issues raised.

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

Finally, this Court should seriously consider rejecting this appeal because of the unconcealed political effort it has revealed itself to be. Defendants' repeated characterization of the lower courts as "activist" cannot be ignored, even if they obviously merit no consideration in evaluating jurisdiction. *MISJ, p. 4*. The decisions on review

faithfully applied this Court's precedents with no deviation, as explained above. Defendants' rhetoric serves only to substitute inflammatory political labeling for substantive legal argument, perhaps because the legal arguments were waived. Asserting jurisdiction now, after Defendants have compared the lower court's ruling to "a policy statement from a Northwest D.C. think tank" and referred to full recovery for an old man who lost his entire eye as "jackpot justice," will send the wrong message to Ohioans. *MISJ, p. 1, 3*. This Court stands for more than the politics of the moment—it stands for reason and the law. But it must carefully guard that reputation by requiring more of the counsel who practice before it. Defendants' unsupported aspersions against the judiciary undermine that effort. In this instance, pithy ad hominem attacks on the lower courts have taken the place of reasoned legal analysis, and that strategy should be rejected.

CONCLUSION

For all of the foregoing reasons, this Court should deny jurisdiction.

Respectfully Submitted,

/s/ Louis E. Grube
Louis E. Grube, Esq. (#0091337)
FLOWERS & GRUBE

/s/ Todd Petersen
Susan E. Petersen, Esq. (#0069741)
Todd E. Petersen, Esq. (#0066945)
PETERSEN & PETERSEN

Attorneys for Plaintiff-Appellee, John Paganini

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Memorandum** has been served by e-mail on April 16, 2025, upon:

Bradley D. McPeek, Esq.
Kellie A. Kulka, Esq.
BRICKER GRAYDON LLP
312 Walnut Street, Suite 1800
Cincinnati, OH 45202
(513) 621-6464
bmcpeek@brickergraydon.com
kkulka@brickergraydon.com

Attorneys for Defendant-Appellants, The Cataract Eye Center of Cleveland, Inc. and Gregory J. Louis, M.D.

Benjamin C. Sassé, Esq.
Elisabeth C. Arko, Esq.
Razi S. Lane, Esq.
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113-7213
(216) 696-3715
benajmin.sasse@tuckerellis.com
elisabeth.arko@tuckerellis.com
razi.lane@tuckerellis.com

Attorneys for Amicus Curiae, Ohio Association of Civil Trial Attorneys

Anne Marie Sferra, Esq.
BRICKER GRAYDON LLP
100 S. Third Street
Columbus, Ohio 43215
(614) 227-2300
asferra@brickergraydon.com

Attorney for Amici Curiae, Ohio Hospital Association, Ohio State Medical Association, Ohio Osteopathic Association, Ohio Alliance for Civil Justice, and Academy of Medicine of Cleveland & Northern Ohio

Sean M. McGlone, Esq.
Senior Vice President and General Counsel, Ohio Hospital Association
155 E. Broad Street, Ste. 301
Columbus, Ohio 43215
(614) 384-9139
sean.mcglone@ohiohospitals.org

Attorney for Amicus Curiae, Ohio Hospital Association

/s/ Louis E. Grube
Louis E. Grube, Esq. (#0091337)
FLOWERS & GRUBE

Attorney for Plaintiff-Appellee, John Paganini

FLOWERS & GRUBE
Terminal Tower, 40th Fl.
50 Public Sq.
Cleveland, Ohio 44113
(216) 344-9393
Fax: (216) 344-9395